

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
(DIVISION 2)

Le v Minister for Immigration, Citizenship and Multicultural Affairs

[2023] FedCFamC2G 130

File number(s): SYG 3633 of 2018

Judgment of: **JUDGE HUMPHREYS**

Date of judgment: 24 February 2023

Catchwords: **MIGRATION** – Administrative Appeals Tribunal – Partner visa – whether Tribunal legally unreasonable – whether Tribunal made error in law – whether Tribunal failed to consider relevant information – whether there was jurisdictional error.

Legislation: *Migration Act 1958* (Cth) ss 5F, 359A, 359AA
Migration Regulations 1994 (Cth) Reg 1.15A

Cases cited: *ABT17 v Minister for Immigration and Border Protection* [2020] HCA 34
ARG15 v Minister for Immigration and Border Protection [2016] FCAFC 174
ASB17 v Minister for Home Affairs (2019) 268 FCR 27
DAO16 v Minister for Immigration and Border Protection [2018] FCAFC 2
Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 3
EVI19 v Minister for Immigration [2022] FCA 518
Fox v Percy [2003] HCA 22
Minister for Immigration and Border Protection v Stretton [2016] FCAFC 11
Minister for immigration and Citizenship v SZNPG [2010] FCAFC 51
Minister for Immigration and Citizenship v SZRKT [2013] FCA 317
Minister for Immigration v Li (2013) 297 ALR 225
Plaintiff M64/2015 v Minister for Immigration and Border Protection [2015] HCA 50
WAE v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 236 FCR 593

Division:	Division 2 General Federal Law
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Place:	Parramatta
Counsel for the Applicant:	Mr Poynder briefed by Vinh Duong & Associates
Counsel for the Respondents:	Mr Flick briefed by HWL Ebsworth

ORDERS

SYG 3633 of 2018

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN: PHUONG CHI LE
Applicant

AND: MINISTER FOR IMMIGRATION, CITIZENSHIP AND
MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: JUDGE HUMPHREYS

DATE OF ORDER: 24 FEBRUARY 2023

THE COURT ORDERS THAT:

1. The decision of the Administrative Appeals Tribunal be quashed.
2. A writ of mandamus be directed to the Tribunal requiring them to determine the Applicant's application according to law.
3. The First Respondent to pay the Applicant's costs fixed in the sum of \$8371.00.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE D HUMPHREYS

INTRODUCTION

- 1 The applicant is a citizen of Vietnam. On 18 September 2012, the applicant applied for a Subclass 820/801 Partner visa (“Partner visa”), sponsored by Minh Duc Tran.
- 2 On 7 July 2015, a delegate of the Minister for Immigration (“the delegate”) refused to grant the applicant her Partner visa on the basis that the delegate was not satisfied that the parties were in a genuine and continuing relationship pursuant s 5F of the *Migration Act 1958* (Cth) (“the *Act*”). In so doing the delegate was required to consider identified circumstances as set out in Reg 1.15A of the *Migration Regulations 1994* (Cth) (“the *Regulations*”). These criteria are: the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the persons’ commitment to each other.
- 3 The applicant sought merits review at the Administrative Appeals Tribunal (“the Tribunal”). On 15 July 2016, the Tribunal affirmed the decision not to grant the applicant her Partner visa. The applicant then sought judicial review in this Court. On 27 July 2017, the decision of the Tribunal or set aside by consent in this Court (differently constituted) and the matter remitted to the Tribunal for further hearing.
- 4 The basis for the remittal was that the Tribunal failed to comply with s 359A of the *Act*, in that it failed to comply with s 359AA(1)(b) of the *Act* by failing to provide the applicant an opportunity to request further time to comment on information provided by the sponsor that was inconsistent to that provided by the applicant.
- 5 The applicant appeared before a differently constituted Tribunal in two separate hearings on 1 June and 5 November 2018. On 14 December 2018, the Tribunal again made a decision to affirm the refusal of the applicant’s Partner visa. The applicant now seeks judicial review in relation to the second Tribunal’s decision.

THE TRIBUNAL DECISION

- 6 Given the grounds of judicial review, set out below, it is necessary to summarise the Tribunal decision at some greater length than might be usual.

- 7 The applicant sponsor was born in Vietnam in 1991. He has declared no previous relationships. The applicant and her sponsor stated they met on 3 December 2011. After five months, they commenced a relationship on 11 July 2012 and they held a traditional engagement party of in Bankstown. The parties were married on 14 July 2012. A Temporary Visa (Subclass 820) was granted on 24 January 2013.
- 8 The decision record of the delegate, dated 7 July 2015, indicated that the delegate was not able to be satisfied as the nature of the household was indicative of a genuine spousal couple or that there was a commitment by the applicant to a long-term relationship with sponsor. The delegate placed weight on information given by the parties that there was no evidence of shared finances, no evidence of shared social activities and there was no evidence of the relationship developing since the temporary visa had been granted.
- 9 Prior to the hearing, the applicant provided documents to the Tribunal which included statements from the sponsor, the mother of the sponsor, two friends, a nomination of beneficiary from the sponsor's superannuation account, a report from a psychologist, copies of receipts and travel documents to Melbourne for the applicant and the sponsor and his mother during the period 30 September 2017 to 2 October 2017 and confirmation of employment for the sponsor for the period 9 November 2009 to 3 June 2016.
- 10 Other documents included income tax returns with sponsor for the financial year 2016-17, a travel itinerary and boarding pass to Vietnam for the sponsor in January 2013 and April 2016, photographs, a wedding ring invoice dated 13 July 2012 with the name of the sponsor and the applicant, a residential tenancy agreement in their joint names dated 9 December 2015 and a receipt of the rental bond of \$2,000.00 paid on the same date.
- 11 On 12 October 2018, the applicant provided documents to the Tribunal, including the following: a bank account held in joint names of the applicant and the sponsor for the period 23 May 2015 to 22 August 2018 together with other financial documents both the applicants and sponsors sole names.
- 12 The Tribunal noted that in the present case, the issue was whether the applicant and his sponsoring spouse continue to be in a genuine and continuing relationship within the meaning of the *Act*.
- 13 At paragraph 23, the Tribunal noted there were a number of inconsistencies in the evidence given at the time of the hearing. It noted that these inconsistencies were put to the parties

following the hearing in accordance with s 359AA of the *Act*. These discrepancies were as follows:

- The applicant said she last went to Vietnam to see a parents in 2017. She said she had gone for three weeks. The sponsor said she had not been back to Vietnam since 2015.
- The applicant said they moved into their present address in April 2016. The sponsor said they moved in December 2017.
- The applicant gave a history of various people living with them on a sub-tenancy basis. This included the amount of money they paid per week and the basis upon which it was paid. The sponsor said he did not know the surname of a particular person who had lived with them for a few months at the present address and did not know how much they paid as the rent was paid to the applicant. He confirmed another couple had then moved in for a few months. He did not know their names. He said there were a Thai lady and a Russian man. The sponsor said there was a period when there was no one living with them until an Indian couple moved in August 2018. This couple paid \$320 per week rent by EFT into the parties' joint account at Westpac.

14 At paragraph 24, the Tribunal noted the applicant was given an opportunity to address the inconsistencies set out above. The applicant submitted that the memory of the sponsor was impacted by his lack of sleep due to working hours, in which he has to wake each day at 2:00AM. Some medical evidence was presented to the Tribunal that indicated that the sponsor, at the time of the hearing, had a severe chest infection, however the Tribunal was unable to make a finding that his evidence was impacted on by this infection.

15 At paragraph 27, the Tribunal noted that it was mindful that the applicant had previously been treated for depression and anxiety. There is evidence that she had sought professional help and a psychologist report was before the Tribunal. The psychologist stated that the applicant's capacity to effectively provide evidence in the formal and structured environment would be impaired. At the second Tribunal hearing, the applicant confirmed she had not been receiving any ongoing treatment since the previous Tribunal hearing in July 2016. At the time of the second hearing, while the applicant told the Tribunal she was stressed, no submission was made as to her ability to give evidence being impacted by her mental health.

16 Paragraph 30, the Tribunal stated as follows:

When taking into account the above and the totality of the evidence given over two hearings, the Tribunal considers the oral evidence given by the applicant and the sponsor to be confused, conflicting and unconvincing. The Tribunal was concerned the parties frequently sought to adjust answers and sought where ever possible to evade giving an answer especially when the questions pertain to the finances of living arrangements. The Tribunal did not consider it plausible the parties could fail

to remember pertinent details about relatively large bank deposits and about who they lived with at various times. The Tribunal was also concerned the answers the parties gave were deliberately vague in an attempt not disclose any information they considered might be prejudicial to the claim. The lack of knowledge and the frequent shifting of evidence displayed particularly by the applicant were not consistent with the relationship the parties claim to have. Whilst it is appreciated Tribunal proceedings can be very difficult for parties and this stress in itself can lead to some inconsistencies in the evidence given, the Tribunal is not satisfied the explanations given are sufficient to overcome the cumulative effect of the inconsistencies.

- 17 At paragraph 34, the Tribunal was satisfied that the parties were legally married on 14 July 2012. The Tribunal then went on to consider whether or not the other requirements for a spousal relationship were met.
- 18 Paragraphs 35 through to 44 deal with the financial aspects of the relationship. The Tribunal noted that at time of the first hearing, the applicant told the Tribunal that she and the sponsor had two joint accounts. One account was used for daily living expenses and to pay the car loan for the car the sponsor owns. His wages were deposited into it. They also operated a Westpac joint account and it was from that account that their rent and utilities were paid. The proceeds of the applicant's Internet business were also deposited into that account.
- 19 The Tribunal noted at paragraph 37, at the time of the second hearing the applicant the sponsor were taken to various bank deposits and asked what the source of the funds deposited or transferred out of account and the purpose for the funds withdrawn. The parties were in many instances unable to recall the source of funds. In other instances they gave conflicting evidence. For example, when asked about an entry in the Commonwealth joint account on 11 November 2015 for the transfer of \$1,960 to a CBA account at an described as "Jesse ticket" the applicant said it was for Vietnamese concert tickets whereas the sponsor said it was a transaction for business goods.
- 20 At paragraph 38, the Tribunal noted there was a lack of consistency in the evidence as to the amounts paid and where those funds were deposited, especially as they related to rent they collected from subtenants.
- 21 At paragraph 39, the Tribunal noted there was no evidence suggest the visa applicant and her sponsor had any joint financial legal obligations. The car loan was in the sponsor's name but had now been paid off.
- 22 At paragraph 40, the Tribunal discusses evidence given by the applicant regarding her work. Whilst there was some inconsistency between the applicant and the sponsor, the Tribunal did

not attach any weight to the inconsistencies as to whether not she worked, as it was clear the applicant did not regard an online business she conducted as “work”. The Tribunal did note however, when the applicant was asked as to her turnover and profit from the business she stated that she did not know as she did not keep any records. She said orders were given to her and she purchased the requisite products. Orders were placed verbally. She did not keep records and did not issue receipts. She did not file tax returns. Notwithstanding this, the Tribunal noted that the sponsor stated that on average, the applicant was paid \$1,000 a week from the business.

- 23 At paragraph 43, the Tribunal accepted that while there was evidence of rent being paid out of the joint bank account, there was a paucity of evidence to enable the Tribunal to make findings the parties had any joint ownership of assets, joint liabilities other than the rent or that they pooled their financial resources or shared day to day household expenses. There was no evidence that either party owed the other party any legal obligations. The Tribunal concluded that it was not able to make findings that, at the time of the decision, the financial aspects of the parties relationship was indicative of them being in a spousal relationship.
- 24 Paragraphs 45 through to 49 deal with the nature of the household. The Tribunal noted the parties gave consistent evidence they had resided together the present address for the past two years and had resided together in their marriage since July 2012. They gave consistent evidence that they shared housework and washing. The applicant does the cooking. The applicant and the sponsor do most of the grocery shopping together at weekends. The Tribunal noted they do not have any joint responsibility for the care and support of children
- 25 At paragraph 48, the Tribunal concluded that the evidence as to the allocation of chores in the household, the residential tenancy agreement and evidence of utility bills in both names was not sufficient to overcome inconsistencies referred to above as to who else resided at the property, the periods that they live there and the amount of rent they paid and how they paid it.
- 26 At paragraph 49 the Tribunal concluded these inconsistencies were persuasive evidence the parties were not in fact part of one household and in that context the Tribunal found it was not sufficiently satisfied to make a finding the parties did in fact reside together as part of one household.

- 27 Paragraphs 50 to 54 deal with the social aspects of the relationship. The Tribunal noted that the time of the application the applicant and the sponsor provided relationship statements outlining history and nature of the relationship. Three supporting statements were provided after the hearing. The Tribunal stated it had taken these into account
- 28 The Tribunal accepted, on the basis of the statements and the photographic evidence that the parties had socialised together with members of their immediate families and some mutual friends. The Tribunal noted in hospital admission notes, for the applicant dated 13 March 2016, the notes record the applicant was married, and gave the name of the sponsor as her emergency contact. The mother of the sponsor gave evidence at the time of the hearing that the applicant and her son spent time with her (the mother) each weekend. They go shopping or eat out.
- 29 At paragraph 54, the Tribunal concluded that the social aspects of the parties' relationship, which was supported by the applicant's family and some friends, was indicative of a couple in a genuine and continuing spousal relationship.
- 30 Paragraphs 55 through to 61 deal with the nature of the parties' commitment to each other. At paragraph 55, the Tribunal noted that, at the time of the hearing and in additional evidence received from the visa applicant, she spoke of her commitment to the marriage of establishing a life together with sponsor. However, when asked, at the time of the hearing, what her plans were if the Visa was granted, the applicant said she wanted to remain in Australia to develop her business. There was no mention of the plans for the relationship with sponsor. Accordingly, the Tribunal was not convinced on the evidence that the commitment to the marriage was mutual.
- 31 The Court notes at this point, that the first respondent has conceded (First Respondent's Submissions paragraphs 31-33) that this finding is factually incorrect and unsupported by the transcripts of the Tribunal hearings. Both parties stated in evidence that they had plans to have children together.
- 32 The Tribunal noted there were a number of inconsistencies in the parties' oral evidence that related to financial and household issues. The Tribunal concluded the lack of knowledge of these matters displayed by the parties was not indicative of a genuine and continuing relationship. The Tribunal did not accept that the sponsor's is claimed lack of sleep was a plausible explanation wherever there was an inconsistency in his evidence. The Tribunal

placed considerable weight on the evidence that indicated that the parties do not communicate as claimed and did not know each other as well as parties in a committed relationship would.

33 Paragraph 59 appears to be either poorly worded at best or otherwise internally contradictory. The Tribunal accepted the parties had on their evidence been in a relationship since they married in 2012 and have lived together since that time. The Tribunal accepted that they were in a co-operative relationship during that period for the purposes of a migration outcome but did not find that the evidence supported that they have **lived** (emphasis added) together since 2012.

34 The Tribunal was not satisfied the applicant and the sponsor provided one another with companionship and emotional support, or that they see the relationship is long-term. The Tribunal was not satisfied it was a genuine relationship rather one that was designed to obtain a preferred migration outcome.

35 Accordingly, at paragraph 62 and onwards, the Tribunal was not satisfied the applicant and the sponsor were currently living in a genuine, committed spousal relationship. Accordingly, the Tribunal affirmed the decision not to grant the applicant spousal Visa.

GROUND OF JUDICIAL REVIEW

36 The applicant relies upon the following grounds of judicial review contained in an amended Initiating Application filed with the Court on 12 August 2019. They are as follows:

1. The Tribunal's decision overall, in particular its reasoning process on the credibility of the applicant and her sponsor, was legally unreasonable.

Particulars

- a) The Tribunal, throughout the decision, made findings that the evidence given by the applicant and her sponsor had been inconsistent when, properly considered and in the context of all the evidence provided to the Tribunal, the evidence was either not inconsistent or not inconsistent in any material way.
 - b) The Tribunal, in the decision at [30]-[31], found that the answers given by the applicant and her sponsor in the tribunal hearings were vague and evasive, when there was no evidentiary basis for such a finding.
2. The Tribunal failed to comply with its obligation under s360(1) of the Migration Act 1958 to invite the applicant to give evidence and present arguments relating to the issues arising in relation to the decision under review.

Particulars

- a) At the hearing convened by the Tribunal on 1 June 2018 and 5 November 2018 the Tribunal undertook to the applicant that she would be put on notice of any inconsistencies and why they were relevant to the decision. The Tribunal failed to carry out this undertaking.
3. The Tribunal failed to consider evidence provided by the applicant which corroborated her claims to be in a genuine and continuing relationship with her sponsor.

Particulars

- a) Not pressed
- b) When making its finding, at [55], that at the hearing of 1 June 2018 the applicant had failed to mention her plans for the relationship with her sponsor, the Tribunal failed to consider the applicants evidence (Question 180) that she and the sponsor planned “to earn enough to purchase a house, and when our life is stable, we will contemplate to have a baby together”. The tribunal also failed to consider the sponsor’s answer to the same question (Question 318) that “we would have two children and will be looking forward to raising up the children and looking after them for the future”.

CONSIDERATION

37 In *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 3 at [17] the task of a Court conducting judicial review was described in this manner:

... an application for judicial review is one in which the judicial branch of government reviews, by reference to legality or lawfulness, the decision or decisions of the Executive branch of government, here in the form of a decision of the Minister. The Court does not consider the merits or wisdom of the decision; nor does it remake the decision. The task of the Court is to rule upon the lawfulness or legality of the decision by reference to the complaints made about it.

38 With respect to adverse credit findings, it is well established that the Tribunal enjoys an advantage of fact to test the veracity of evidence given orally by observing the witness: (see; *Fox v Percy* [2003] HCA 22 at [41]; *ABT17 v Minister for Immigration and Border Protection* [2020] HCA 34 at [62]). Thus, a Court undertaking judicial review should adopt caution before finding credit findings by the Tribunal where witnesses have given evidence as unreasonable.

39 Unreasonableness is where a decision-maker has come to a conclusion so unreasonable that no reasonable decision-maker could have come to it (see; *Minister for Immigration v Li* (2013) 297 ALR 225 at [28] (“*Li*”), or where a decision has been made that lacks an “evident and intelligible justification”: (see; *Li* at [76])). The test for unreasonableness is “stringent”

and will only arise in rare cases. Unreasonableness is not a means for challenging a decision on the basis that the Court disagrees with the consideration of matters or the evaluative judgements made by the decision-maker: (see; *Li* at [30], [113]).

40 In *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 at [11] Allsop CJ said the following concerning a review of a decision for legal unreasonableness:

The task is not definitional, but one of characterisation: the decision is to be evaluated, and a conclusion reached as to whether it has the character of being unreasonable, in sufficiently lacking rational foundation, or an evident or intelligible justification, or in being plainly unjust, arbitrary, capricious, or lacking common sense having regard to the terms, scope and purpose of the statutory source of the power, such that it cannot be said to be within the range of possible lawful outcomes as an exercise of that power. The descriptions of the lack of quality used above are not exhaustive or definitional, they are explanations or explications of legal unreasonableness, of going beyond the source of power.

41 Further, in considering the reasons of the Tribunal it is important not to look too closely at them in the pursuit of error. In *WAEF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 at [46], the following was said:

The Tribunal is not a court. It is an administrative body operating in an environment which requires the expeditious determination of a high volume of applications... [I]ts reasons are not to be scrutinised “with an eye keenly attuned to error”. Nor is it necessarily required to provide reasons of the kind that might be expected of a court of law.

42 That said, this Court is bound to consider the reasons of the Tribunal where the outcome of the matter revolves around adverse credit findings with care, so as to ensure those credit findings are not based on ‘minor inconsistencies and trivial errors’ and have ‘logical and probative weight’. This must be done however, without the advantage of assessing the demeanour of the witnesses giving evidence.

43 In relation to Ground 1(a) the applicant submits that jurisdictional error may arise where adverse credibility findings are based on “inconsistencies” which are not in fact inconsistent (see; *ASB17 v Minister for Home Affairs* (2019) 268 FCR 271 at [42]-[43]), or where the identified inconsistency is immaterial. In *EV119 v Minister for Immigration* [2022] FCA 518 (“*EV119*”) Stewart J had the following to say at [36]:

It is well-established that credibility findings are not immune from judicial review: *CGQ15 v Minister for Immigration and Border Protection* [2016] FCAFC 146; 253 FCR 496 at [37]-[38] per McKerracher, Griffiths and Rangiah JJ. Credibility findings, like all findings, must be rationally made and based upon facts having logical and probative weight, and be articulated properly; minor inconsistencies and trivial errors do not constitute a valid ground upon which an adverse credibility

finding may be made: *SZSHV v Minister for Immigration and Border Protection* [2014] FCA 253 at [31] per Flick J; *SZLGP v Minister for Immigration and Citizenship* [2008] FCA 1198 at [25] per Gordon J. See also *DAO16 v Minister for Immigration and Border Protection* [2018] FCAFC 2; 258 FCR 175 at [30] per Kenny, Kerr and Perry JJ and *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1 at [11] per Allsop CJ.

44 The Court notes Stewart J went on to say at [37]:

The Authority’s finding that “the applicant is not a credible witness and has fabricated his claims in their entirety”, set out in full at [15] above, relies on intermingled findings in coming to that conclusion, many of which are impugned by the appellant. Although the Minister concedes that some of the findings involve errors of fact, he submits that those errors do not amount to the Authority’s adverse credit finding being in jurisdictional error by reason of unreasonableness. It is necessary to consider each of the alleged errors, and then to assess whether any accumulation of errors is such as to render the decision as a whole unreasonable. It is also necessary to bear in mind that the Authority did not itself interview or see the appellant. Its adverse credibility findings are therefore not supported by any considerations of demeanour.

45 In relation to the inconsistency as to when the applicant had last returned to Vietnam to see her parents, it was submitted the sponsor did not say the applicant had not been back to Vietnam since 2015. Rather, the inconsistency did not exist or, there was so much consistent evidence between the parties’ accounts, such a minor area was trivial.

46 In relation to the second inconsistency, being when the parties moved into premises in Southern Sydney. It was submitted the Tribunal found that the applicants evidence that they moved into their present address in April 2016 was inconsistent with the sponsor’s evidence that they moved into the premises in December 2017. At both hearings, the applicant said they moved into this address in December 2015. During the first hearing, the sponsor said they had been living at that address for two years. In the second hearing, he said they had moved into that address at the end of 2015. It was submitted there was no material inconsistency between the parties’ answers as to how long that lived at that present address.

47 In relation to the third inconsistency, being the identity of and rent collected from subtenants, it was submitted that the inconsistency related to the three times over several years that the parties had sublet part of the premises to other tenants. The applicant said that a man called P H was the first co-tenant and stated she was not sure when he moved in and that he paid between \$300-\$320 per week in rent. She said he paid her in cash. The sponsor said he knew the name of the first tenant as P did not know his surname.

48 The applicant said that their second cotenant was one couple who “only moved out three months ago”. She said this couple paid \$320 per week in rent and they paid her in cash. She

was not asked anything about the identity of the couple. The sponsor said that the cotenants were a couple who moved out after “just a few months”. He said he did not know their names but that the lady “was a Thai lady and a Russian man”. He said they paid from around \$700-\$720 per fortnight which was credited to the parties’ joint Westpac account.

49 The applicant said that the third co-tenant was another couple had moved in in August. She said that were “Indian and I struggle to remember their names”. She said they paid rent \$300 per week by EFT to the Westpac joint account. The sponsor said that the next cotenants were an Indian couple who moved in in August. He said they paid rent of \$320 per week by money transfer to the parties’ joint Westpac account.

50 On behalf the applicant, it was submitted that all the inconsistencies identified, related to minor differences in the parties evidence as to how much by which method there cotenants paid rent. It was submitted this was hardly surprising, given the applicant had taken responsibility for collecting rent, and some of the payments dated back more than two years.

51 The fourth inconsistency relied upon, related to the transfer of funds from the parties joint CBA account to “Jesse” referred to at paragraphs [37], [56] of the Tribunal decision.

52 It was submitted this bank entry related to the transaction three years earlier of \$1,960 dollars described as “Jesse ticket” which the applicant said was for Vietnamese concert tickets purchased for about 9 to 10 people. At the Tribunal, the sponsor said this was a transaction for business goods. At the hearing, both the applicant and the sponsor indicated that “Jesse” was an anglicised name. The sponsor gave the complete Vietnamese name as BPJN, who was identified in other transactions on 11 and 14 November 2015. It was submitted that the sponsor did not say that the transaction was for business goods; he said that the transaction was done by the applicant and that it was probably to do with business goods and products but “I actually don’t know”

53 It was submitted that both parties recognised Jesse as the transferee and the sponsor was guessing when he said it was probably to do with business goods and products but that he actually didn’t know. It was submitted that was to be expected that a couple who run a joint account would not necessarily know each and every transaction conducted by the other, particular transaction which by the time of the hearing had taken place some three years beforehand. There was thus no material inconsistency in these answers.

54 It was submitted that these inconsistencies claimed by the Tribunal may be contrasted with the marked consistency of the parties other evidence, as set out in paragraph 48 of the decision record. It was submitted that the inconsistencies relied upon by the tribunal were indicative of “a quest to disbelieve”.

55 The first respondent relied upon *DAO16 v Minister for Immigration and Border Protection* [2018] FCAFC 2 at [30] where the following was said:

[30] The relevant principles can be summarised as follows.

- 1) While findings as to credit are generally matters for the administrative decision maker, this does not mean that such findings as to credit are beyond scrutiny on judicial review: *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146 (CQG15) at [37]-[38] (the Court). The question of whether a credibility finding is tainted by jurisdictional error is a case specific inquiry, and is not assessed by reference to fixed categories or formulae (*ARG15 v Minister for Immigration and Border Protection* [2016] FCAFC 174; (2016) 250 FCR 109 (ARG15) at [83](b)). In each case it is necessary to analyse in detail what the decision-maker has decided: *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317; (2013) 212 FCR 99 (SZRKT) at [77] (Robertson J).
- 2) Without derogating from the case specific nature of the inquiry, adverse credibility findings may involve jurisdictional error on recognised grounds such as legal unreasonableness or reaching a finding without a logical, rational or probative basis (ARG15 at [83] (d)). In this regard, Crennan and Bell JJ explained in *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 (SZMDS) that:

135. ... A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence **or if there is no logical connection between the evidence and the inferences or conclusions drawn.**

(Emphasis added)

- 3) By way of example, in SZRKT at [78], Robertson J considered that jurisdictional error may be established where a finding on credit on an objectively minor matter of fact constitutes the basis on which the decision-maker rejects the entirety of an applicant’s evidence and claims. Furthermore, as Flick J explained in *SZVAP v Minister for Immigration and Border Protection* [2015] FCA 1089; (2015) 233 FCR 451 (SZVAP) at [22] (in a passage on which the appellant particularly relied), “[u]nwarranted assumptions by a Tribunal as to matters relevant to the formation of a view on the credibility of a corroborative witness may cause the Tribunal to disbelieve and disregard that evidence and may constitute a failure duly to consider the question raised by the material put before it: WAGO of 2002 v

Minister for Immigration and Multicultural and Indigenous Affairs (2002) 194 ALR 674 at [54].” Equally jurisdictional error may be established by “a process of reasoning which damns a man’s credibility by reference, materially, to a false factual premise concerning a critical document”: *SZLGP v Minister for Immigration and Citizenship* [2009] FCA 1470; (2009) 181 FCR 113 at [37].

- 4) Findings or reasoning along the way to reaching a conclusion by the decision-maker that are illogical or irrational may establish jurisdictional error (*SZMDS* at [132] (*Crennan and Bell JJ*)). In this regard, with respect to the significance of an illogical or irrational finding as to credit to the administrative decision necessary to establish jurisdictional error, Wigney J explained in *Minister for Immigration and Border Protection v SZUXN* [2016] FCA 516 (in a passage approved in *CQG15* at [60]) that:

56 An irrational or illogical finding, or irrational or illogical reasoning leading to a finding, by the Tribunal that the review applicant was not a credible or honest witness may in some circumstances lead to a finding of jurisdictional error. That would particularly be the case where the adverse credibility finding was critical to the Tribunal’s decision that it was not satisfied that the applicant met the criteria for the grant of a visa. Whilst it is frequently said that findings as to credit are entirely matters for the Tribunal, such findings do not shield the Tribunal’s decision-making processes from scrutiny...

(citations omitted)

- 5) A high degree of caution must, however, be exercised before finding that adverse findings as to credit expose jurisdictional error in order to ensure that the Court does not embark impermissibly upon merits review: *SZMDS* at [96]; *SZVAP* at [14]-[15]. As such, to establish jurisdictional error based on illogical or irrational findings of fact or reasoning, “extreme” illogicality must be demonstrated “measured against the standard that it is not enough for the question of fact to be one on which reasonable minds may come to different conclusions” (*SZRKT* at [148]; see also *SZMDS* at [135] and *CQG15* at [60]). Thus, “[e]ven emphatic disagreement with the Tribunal’s reasoning would not be sufficient to make out illogicality”: *CQG15* at [61].

56 In relation to the first inconsistency, being when the applicant had last travelled to Vietnam, it was submitted that the applicant’s submissions incorrectly characterise the evidence given by the sponsor read in context. The sponsor’s evidence was that the applicant had only seen his mother once in 2015 after seeing her in 2014. It was submitted that this was one of the issues in which the Tribunal gave the parties an opportunity to further respond and the sponsor gave no further information for. The Tribunal found at paragraph 57 that the explanation provided by the visa applicant was not persuasive. The Tribunal did not regard it as plausible that the parties would not remember with some specificity such important details.

- 57 In relation to the inconsistencies as to who lived with them subtenants and what rent was paid, it was submitted that the applicant and the sponsor gave inconsistent evidence as to the broader financial arrangements between them which are set out at paragraphs 35 to 38 of the decision record. The Jesse transaction was given only by way of an illustration. The Tribunal was concerned that he could not recall what significant sums of money went into the joint account and defaulted on a number of occasions to “I don’t know” or “I don’t remember”. It was submitted that the applicant ignores other inconsistencies in the evidence in relation to financials, for example a deposit from Tran in 2014/15 were from the previous tenant according to the applicant. Whereas, this deposits came, according to the sponsor, “from a wife’s client”, then equivocated and said “probably my wife’s client” and then “I don’t actually remember, it is probable the – a friend of her”. It was submitted that these were examples of transactions where the applicant’s evidence was ultimately at odds of that given by the sponsor.
- 58 In respect of the parties’ evidence as to who lived with them, the Tribunal found at paragraph 23 “the Tribunal does not consider it plausible that the parties could fail to remember pertinent details about relatively large bank deposits about who lived with them at various times”.
- 59 It was submitted when the findings are analysed carefully, it’s apparent that those findings were the result of the comparison between the evidence given by the applicant and her sponsor over the course of two hearings and in response to an invitation to provide further information following the hearing. It was submitted that the correct test is whether the inconsistencies were reach without a logical, rational or probative basis: (see; *ARG15 v Minister for Immigration and Border Protection* [2016] FCAFC 174 at [83]). It was further submitted the applicant’s contention that the parties gave inconsistent evidence cannot be answered by reference to other evidence. The final contention that the inconsistencies found by the Tribunal are immaterial trespasses into impermissible merits review. The Courts task in assessing is whether the decision is vitiated for legal unreasonableness that is strictly supervisory: (see; *Li* at [66]).
- 60 The Court in this case must tread a very thin line in considering whether or not jurisdictional error is made out on the basis that inconsistencies are immaterial, such that the adverse credibility finding does not have a logical or probative weight, without trespassing into impermissible merits review. Again, by reference to *EVII9* above cited at [36], minor

inconsistencies and trivial errors do not constitute a valid ground upon which an adverse credibility finding can be made.

- 61 In doing so, the Court needs to apply a degree of common sense as to whether or not the degree of inconsistency between the parties, or indeed a lack of knowledge of some elements of the various criteria required to be considered by the regulation, would indeed be normal in any relationship, or whether the inconsistencies relied upon by the Tribunal are such that a valid adverse credit finding can be made.
- 62 The Tribunal emphasised at various points in its decision record that it considered cumulatively all of the inconsistencies noted, and that it was on this basis that it came to the conclusion that the parties were not in an ongoing spousal relationship for the purposes of the *Act*. This was notwithstanding the fact that the Tribunal was satisfied in relation to one aspect of the four criteria required to be considered being the social aspects of the relationship.
- 63 The Court is of the view, looking at all of the evidence, that the conclusions drawn by the Tribunal are not supported by the evidence. That is, there is not a logical probative evidential basis for the conclusions drawn such that jurisdictional error exists.
- 64 The Court does not consider that a lack of knowledge of various transactions in a joint account by one party is indeed abnormal or evidence the parties do not have an ongoing spousal relationship. The Tribunal did not consider for example, whether or not one party may have greater control of the financial aspects of the relationship than another as the other party is happy to let this occur. The Court does not consider that the failure of the sponsor to indicate what one transaction was that related to Jesse is indicative of there being no intermingling of financial affairs, noting that the parties had joint accounts, including one that was run as a business account by the applicant.
- 65 The Court does not consider that a lack of memory of the exact amounts paid by various different co-tenants over a period of time is evidence of a lack of a continuing spousal relationship. It is to be noted that the evidence given by the sponsor in relation to the latest co-tenants was consistent with that given by the applicant. The Court does not consider that some vagueness is when one of the parties last returned to Vietnam to see her parents or the exact date of when they moved into their prisoners address also to be inconsistent with an

ongoing spousal relationship. Ground 1(a) is made out such that the applicant should be granted the relief sought in the initiating application filed with the Court.

66 While it is not strictly necessary for the court to deal with the other grounds of judicial review, it is appropriate to do so. In relation to ground 1(b) it is submitted that at [30] the Tribunal claimed “the answers the parties gave were deliberately vague in an attempt not to disclose any information they considered may be prejudicial to the claim”. At [31] the Tribunal referred to the “evasiveness” of the applicant’s evidence. No plausible examples were given to such vagueness or evasiveness. This was obviously considered by the Tribunal to be highly significant; however without any supporting reasoning, and by ignoring other evidence which was obviously consistent and true, the Tribunal again fell into error.

67 The respondent submits a high degree of caution must be exercised lest the court be drawn into impermissible merits review. It submitted for ground 1(b) to be made out, the applicant will need to demonstrate “extreme” illogicality or irrationality in the credit findings and further that adverse credit findings do not require positive evidence. It is sufficient for the Tribunal to simply disbelieve the evidence because of the surrounding circumstances: (see; *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317 at [148]).

68 The Court is of the view that in order for the Tribunal to find that the parties evidence was deliberately vague in an attempt not to disclose information that might be prejudicial, there needs to be clear examples of obfuscation by the witnesses, rather than, as appears in this case, when pressed, parties admitting that they actually did not really know all the detail. This lack of knowledge needs to be viewed again, with common sense as to what might be the case in a relationship, where one party may take care of various aspects of the relationship and the other being content for this to occur. For the reasons set out in relation to ground 1(a), the Court is also satisfied that this ground is made out. The Court is not satisfied that the inconsistencies were such to ground a finding that the parties were not in a spousal relationship for the purposes of the *Act*.

69 Ground 2 is an allegation of a failure to comply with s 360(1) of the *Act* in that there was no opportunity to give evidence and present arguments relating to issues arising in relation to the decision under review.

- 70 It was submitted that at the first hearing the Tribunal twice undertook to put the applicant on notice of any inconsistencies and why they were relevant to the decision. This undertaking was repeated in the second hearing.
- 71 However, the only time the Tribunal attempted to put the inconsistencies to the applicant was at the end of the second hearing. The Tribunal did not put the applicant on notice with regard to inconsistency for set out above, in relation to the “Jesse” payment. It was submitted in fact, at Q277 at the second hearing, the Tribunal positively reassured the applicant there was no significant inconsistencies on the financial evidence, which stands in contrast to the ultimate fighting about the “Jesse” payment.
- 72 The Court is satisfied that this ground is misconceived for the simple reason that the Tribunal did put the applicant on notice of the relevant inconsistencies of the first and second hearing and afforded the applicant an opportunity to respond. The applicant did respond, in terms which indicate that she was aware of the relevance of the issues arising in relation to the decision under review. The decision clearly reveals that the Tribunal was cognisant of that response and took it into account.
- 73 The Court accepts the submission of the first respondent, that the Tribunal did not provide an undertaking and that at question 341 in the first hearing, the Tribunal said “there was some inconsistencies in the evidence and I will consider how I put you on notice of those inconsistencies and give the opportunity respond to the concerns I have”. At the conclusion of the second hearing, the Tribunal expressly outlined the relevant inconsistencies and went on to offer the applicant and her sponsor time to respond. Ground two has no merit.
- 74 Ground 3(b) is an allegation the Tribunal failed to consider evidence. It is asserted that the finding of the Tribunal at paragraph 55, that the evidence of the parties’ commitment to each other was confused and unconvincing, the applicant made no mention of her plans in the future of her relationship with the sponsor. It submitted this is simply not true and does not reflect the actual evidence given by the parties. Both parties gave evidence of the plans to have children in the future should the applicant be granted the visa
- 75 In relation to ground three, the first respondent submits the only particular pressed asserts the Tribunal failed to consider the applicants evidence in response to questions 180 and 318 of the first hearing. It was submitted this ground misunderstands the Tribunal’s reasons. The particularised answers relied upon by the applicant were to the effect that she planned to have

a baby with the applicant, and would have two children and look forward to raising them. These answers were reflected in the Tribunal's reasoning at paragraph 55. The Tribunal there acknowledged the applicant had, at the time of the hearing and additional evidence provided, spoken of a commitment to the marriage and of establishing a life with the sponsor. Those reasons encompass the answers to the questions relied upon by the applicant in the submissions paragraph 38.

76 There is no jurisdictional error in the sense relied upon by the applicant. The evidence given by the applicant is not a mandatory relevant consideration, and in any event, the Tribunal did not fail to consider that evidence.

77 As a matter of fairness, the first respondent noted that in the Tribunal's findings at paragraph 55, the Tribunal first referred to the applicant's answer to a question asked at the time of hearing as to her plans of the visa were granted.

78 The first respondent concedes the finding is unsupported by the transcripts. However, the Tribunal's finding amounts to a mistake of a discrete fact. Although the Tribunal considered that fact in the context of its consideration of the one of the matters that regulation 1.15A (3), the highest that the issue can be put is the Tribunal is made a factual error. The error does not go to a jurisdictional fact even to the extent that it feeds into a mandatory relevant consideration.

79 It was submitted this is the very area where the Courts and Tribunals are permitted to make errors of fact within the jurisdiction which has been entrusted to them without over-zealous scrutiny: (see; *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50 at [25]). An error of fact based on a misunderstanding of evidence in considering an applicant's claims is not jurisdictional error so long as the error does not mean that the Tribunal is not considering those claims: (see; *Minister for immigration and Citizenship v SZNPG* [2010] FCAFC 51 at [28] ("*SZNPG*"). To say otherwise would have the consequence that any error of fact in the Tribunal's reasons on matters which relate to the Tribunal's satisfaction as to the matters set out in Reg 1.15A(3) of the *Regulations* involves the Tribunal falling into jurisdictional error.

80 Noting, the concession that an error of fact did occur, the Court needs to consider whether not that error of fact was material. Only if the error was material, does jurisdictional error exist.

81 It is to be noted that the Tribunal on a number of occasions expressed that its disbelief of the applicant was based on a cumulative consideration of all of the evidence. The Court cannot be satisfied that the error of fact, which is conceded, did not feed into the adverse other credit findings that were made by the Tribunal. The Courts have emphasised the non-linear nature of credit findings, and that where there is an error in relation to one credit finding, it is very difficult not to be satisfied that the error has not infected the other credit findings. This is particularly the case where there are intermingled credit findings.

82 Given that this matter went to an essential element in relation to the consideration of the Tribunal, that being the nature of the parties commitment to each other, the Court cannot be satisfied that the admitted error is not material, the Court cannot be satisfied that it did not infect the other credit findings. In these circumstances, the applicant must be given the benefit of the doubt. Accordingly, this ground has merit.

DISPOSITION

83 For the reasons given above, the applicant is entitled to the relief sought in the originating application filed with the court. The court will hear the parties as to costs.

I certify that the preceding eighty-three (83) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Humphreys.

Associate:

Dated: 24 February 2023